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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 699

JOHN A. JOHNSON, Petitioner,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit.

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

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SUBJECT INDEX.

	Page
Petition	1-7
Summary statement of matter involved	2
Reasons for granting the writ	5
Brief in support of petition	8
Opinions below	8
Jurisdiction	8
Statement of the case	8
Specifications of error	8
Argument	9
I. The trial and conviction of the petitioner deprived him of due process of law and of the assistance of counsel in violation of the Fifth and Sixth Amendments to the Constitution of the United States	9
II. The court below had jurisdiction to discharge the petitioner on writ of habeas corpus	12
Conclusion	15

TABLE OF AUTHORITIES.

CASES:

Brown v. Mississippi, 297 U. S. 278 ..... 6, 11, 12, 14
Downer v. Dunaway, 53 F. (2d) 586, 589 ..... 13, 14
Mooney v. Holohan, 294 U. S. 103 ..... 6, 14
Moore v. Dempsey, 261 U. S. 86 13
Powell v. Alabama, 287 U. S. 45 ..... 6, 9, 10, 11, 14

STATUTES:

Federal Constitution, Fifth and Sixth Amendments 5, 9
Judicial Code, Sec. 240 (a), as amended by the Act of February 13, 1925 8
28 U. S. C. A., Sec. 451 12
28 U. S. C. A., Sec. 453 12

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No.....

JOHN A. JOHNSON, Petitioner,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

PETITION.

John A. Johnson, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above case on November 24, 1937 (R. 66), affirming the judgment of the United States District Court for the Northern District of Georgia.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner filed his petition for the writ of habeas corpus, complaining of his detention in the Federal Penitentiary in Atlanta, Georgia, alleging that he was being held in violation of his constitutional rights. He was arrested in Charleston, South Carolina, on November 21, 1934, together with one Monroe C. Bridwell, charged with feloniously uttering and passing four (4) counterfeit twenty-dollar Federal Reserve notes, and with knowingly and feloniously possessing twenty-one (21) counterfeit Federal Reserve notes, with intent to defraud. At the time of their arrest, petitioner and Bridwell were in the United States Marine Corps, on leave. A hearing was had before the United States Commissioner, at which the men were represented by counsel of their own choosing. They were bound over to await the action of the United States grand jury and, being unable to give bail, were confined in a local jail. An indictment was rendered against them at the next term of court on January 21, 1935. They knew nothing of this indictment until they were brought into court on January 23rd, at which time they pleaded not guilty, and were placed on trial (R. 41, 48).

The men were unable to provide counsel for themselves; the court did not appoint counsel for them; therefore, they were not represented by counsel at the trial. The petitioner, who was thus put in jeopardy of his liberty, had no schooling beyond the fifth grade, and was without any legal knowledge or skill. He was utterly without funds and knew no one in the vicinity of Charleston, where the trial took place. He neither examined witnesses nor testified on his own behalf, nor addressed the jury, although his co-defendant, Bridwell, attempted in a feeble way to

speak in defense of himself and of the petitioner (R. 46, 48).

During the trial, Bridwell stated that he did not think that men *of such limited knowledge as he and petitioner were* would know counterfeit money when they saw it, and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, *who* was a deputy sheriff in charge of tax collections, and *handled considerable money in performing his duties* (R. 69). He testified that the money was counterfeit and that that fact was readily discernible.

In addition to the undisputed facts as hereinabove set out, both petitioner and Bridwell testified that they asked the District Attorney in open court whether they could have counsel appointed for them and he replied that counsel was not appointed in South Carolina except in capital cases. The men also testified that they asked the District Attorney in open court after the trial was under way if they could have witnesses, and that he replied it was then too late. The District Attorney and his assistant both disputed the evidence as to the request for counsel and the request for witnesses. Neither court below made any findings as to these disputed facts.

A verdict of guilty against petitioner and Bridwell was rendered on the same day, and the men were both sentenced to be imprisoned for four (4) years and six (6) months. The second morning after the trial, they were transported by automobile from Charleston to Atlanta, a day's trip, and upon arrival there they were placed in quarantine at the Federal Prison. No appeal was taken from this judgment, petitioner having testified upon the habeas corpus proceeding that he knew nothing as to his rights to have counsel at the trial and that he knew noth-

ing as to his rights relating to the filing of a motion for a new trial or prosecuting an appeal.

The petitioner alleged that the judgment of conviction was an absolute nullity on the grounds that he was innocent of the charge, that he was denied compulsory process for obtaining witnesses in his favor, and the right to have the assistance of counsel for his defense, in violation of the Sixth Amendment to the Federal Constitution, and was therefore denied due process of law in violation of the Fifth Amendment to the Federal Constitution. The District Court appointed counsel to represent petitioner on the trial of the habeas corpus case and evidence was taken on the hearing. The District Court reached the conclusion that petitioner and Bridwell, who filed a petition at the same time, had been deprived of constitutional rights as alleged but that, as the trial court had jurisdiction, the judgment was not void, and the errors and irregularities could be corrected only on appeal. *Bridwell v. Aderhold*, 13 F. Supp. 253. No appeal was taken from this judgment. However, in December, 1936, the application for release on habeas corpus was renewed on the same grounds. Petitioner appeared by counsel and additional evidence was taken and the District Court again discharged the writ and referred to its opinion in the prior case (R. 56). It is from this decision of the District Court that the present appeal was taken. The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Circuit in its opinion of November 24, 1937. Bridwell has since been released on parole, and his appeal is not being prosecuted.

The Circuit Court of Appeals in its opinion stated,

> "They did not request the trial judge to appoint counsel for them. Perhaps it would have been better

if he had done so of his own motion, but we are not advised of any decision of a court of last resort, state or federal, holding that in a noncapital case he was bound to do so. In fact, a number of decisions to the contrary, which we need not review, are cited by counsel for the United States. In *Powell v. Alabama* the decision was that counsel should have been appointed in that case but the court expressly refrained from deciding whether that rule should obtain in all cases" (R. 41).

The Circuit Court of Appeals further stated,

"Due process of law does not absolutely require that the defendant in every criminal case be represented by counsel. He may expressly or impliedly waive his right and suffer no wrong. When a defendant is without counsel the judge usually protects his rights * * *" (R. 41).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals in the case at bar involves an important question of Federal law which has not been, but should be, settled by this Court. The Circuit Court of Appeals held that in a trial for the commission of a non-capital felony, the penalty for which on each of two counts was imprisonment not exceeding fifteen years, due process of law did not absolutely require that the accused be represented by counsel. Such a holding, while not in direct conflict with any applicable decision of this Court, is without precedent in this Court to support it, and is in conflict with the provisions of the Fifth and Sixth Amendments to the Federal Constitution.

2. Such decisions of this Court as discuss the right to counsel as an essential element of due process indicate that the decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court, particularly the cases of *Powell v. Alabama*, 287 U. S. 45, and *Brown v. Mississippi*, 297 U. S. 278.

3. The decision of the Circuit Court of Appeals that where the Court has jurisdiction it is only in extraordinary cases of denial of due process when the circumstances surrounding the trial make it a sham and a pretense that the writ will lie, and that the circumstances of the trial of Johnson and Bridwell did not come within this description is probably in conflict with *Brown v. Mississippi* (supra), where the denial of counsel was said, by way of illustration, to turn a trial into a "mere pretense," and in conflict with *Mooney v. Holohan*, 294 U. S. 103, where the right to habeas corpus was recognized where another type of "mere pretense" was substituted for a trial.

Whether the decision of the Circuit Court of Appeals is based upon the theory that there was no denial of due process as guaranteed by the Constitution, or whether the decision is based upon the proposition that such denial of due process was of such slight degree as not to warrant interference with the void sentence through the process of habeas corpus (the only way open to petitioner when left without guidance of counsel to perfect an appeal within the five-day limit), it is submitted that the decision is in conflict with the principles of justice as announced by this Court in the cases cited, in that it deprives petitioner of the right to counsel as guaranteed by the Sixth Amend-

ment, and of due process of law as guaranteed by the Fifth Amendment of the Constitution.

Wherefore, it is respectfully prayed that the petition be granted.

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

There was no reported opinion of the District Court, but that Court referred to its earlier opinion in a similar case reported at 13 F. Supp. 253. The opinion of the Circuit Court of Appeals is reported at 92 F. (2d) ..., and will be found at page 66 of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 24, 1937. Jurisdiction to issue the writ requested is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

A statement of the case will be found in the petition.

SPECIFICATIONS OF ERROR.

Petitioner contends that the Circuit Court of Appeals erred:

1. In holding that in the trial of petitioner for a non-capital felony the trial court was not required to appoint counsel to represent him.

2. In holding that where the accused was tried for a non-capital felony without the assistance of counsel when he was of limited education and without legal skill or

knowledge and without knowledge of his legal rights, and such trial resulted in his conviction, sentence and commitment to the United States Penitentiary for four and one-half (4½) years, petitioner was not entitled to be released upon his petition for writ of habeas corpus.

3. In holding that the judgment of the trial court discharging the writ sought by petitioner was right.

4. In not reversing the judgment of the trial court and releasing petitioner on his writ of habeas corpus.

ARGUMENT.

I.

THE TRIAL AND CONVICTION OF THE PETITIONER DEPRIVED HIM OF DUE PROCESS OF LAW AND OF THE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment provides that "no person shall be deprived of life, liberty or property, without due process of law." The Sixth Amendment declares that "in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Whatever might have been thought the law prior to *Powell v. Alabama*, 287 U. S. 45, it was by that decision established that in a proper case "the aid of counsel is essential to due process" (287 U. S., at p. 68). The issue, of whether the petitioner in the instant case was deprived of his constitutional rights, is therefore presented under both the Fifth and Sixth Amendments. And upon the facts

of the instant case it must be held, it is submitted, that he was deprived of those rights.

The defendant was without funds to employ counsel; he was a person of little education; he was from a distant state; he had no friends in Charleston; he tried, without success, to obtain counsel without compensation. He was brought to trial immediately upon being informed of his indictment. He was charged on an indictment of two counts, where a maximum penalty of fifteen years in the penitentiary and a fine of $5,000 on each count might have been imposed. Under all these circumstances it must be held, as in *Powell v. Alabama, supra,* that "it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law" (287 U. S., at p. 71), a duty which the Supreme Court indicated unmistakably was imposed upon the courts of the United States as well as state courts (see 287 U. S., at p. 73). The failure of the trial court to appoint counsel was, petitioner contends, "a denial of due process."

That the Circuit Court of Appeals did not fully appreciate the significance of the *Powell* case is clear from the last paragraph of the opinion of that court, wherein the following language appears:

> "When a defendant is without counsel, the judge usually protects his rights."

Elsewhere in its opinion, the Circuit Court of Appeals recited an incident which itself illustrates the fallacy of the theory that an impartial judge usually protects the rights of an unrepresented defendant. The court stated (R. 68):

> "During the trial Bridwell stated that he did not think that *men of such limited knowledge as appel-*

> *lants would know counterfeit money* when they saw it and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, *who was a deputy sheriff in charge of tax collections and handled considerable money in performing his duties.* He testified that the money was counterfeit and that that fact was readily discernible." (Italics supplied.)

The incident points to the very reason why the Supreme Court in *Powell v. Alabama, supra,* rejected the argument that the constitutional requirements of due process were satisfied by the presence of an impartial judge. As was said in that case (287 U. S., at p. 61):

> "* * * But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the Court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

Then, again, the Circuit Court of Appeals misconceived the holding of this Court in the case of *Brown v. Mississippi,* 297 U. S. 278, when it stated:

> "He may expressly or impliedly waive his right and suffer no wrong" (R. ~~72~~ 87).

In the *Brown* case, the accused had been convicted upon the confessions obtained by third-degree methods and his constitutional right against self-incrimination was thus denied. The accused was represented by counsel and it was contended that failure by counsel to move for the exclu-

sion of the confessions operated as a waiver of the constitutional right against self-incrimination. The Supreme Court held that the denial of this right was not a mere error which could be thus waived by the attorneys for the accused, but was an error which rendered the trial a nullity. Mr. Chief Justice Hughes said, at page 286:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey, supra.*"

Moreover, it is not pretended here that Johnson waived his rights, either expressly or impliedly. It is not denied that he was totally ignorant of his right to counsel. Without such knowledge there could be no waiver.

II.

THE COURT BELOW HAD JURISDICTION TO DISCHARGE THE PETITIONER ON WRIT OF HABEAS CORPUS.

The statute regulating the issuance of writs of habeas corpus, so far as here material, provides:

> "*Power of Courts.* The Supreme Court and the district courts shall have power to issue writs of habeas corpus" (28 U. S. C. A., Sec. 451).
>
> "*When prisoner is in jail.* The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he * * * is in custody in violation of the Constitution or of a law or treaty of the United States * * *" (28 U. S. C. A., Sec. 453).

The district court in its opinion upon the first hearing pointed out that "the technicalities involved in the trial and subsequent proceedings for a new trial or appeal were such as to require the appointment of counsel as an essential element of the trial." 13 F. Supp. 253, 255. In spite of the recognition of this principle, enunciated by the Circuit Court of Appeals for the Fifth Circuit in *Downer v. Dunaway,* 53 F. (2d) 586, 589, the decision of the trial court has the effect of saying that the Constitution protects a defendant against his ignorance of his right to have counsel assigned at his trial, but upon his conviction regards him not only as a sadder but a wiser man—wise enough indeed to know not only that he has already been deprived of his constitutional right to counsel, but also that he now has the right to have counsel appointed who will, by motion for new trial or appeal, secure for him a new trial at which he will have counsel. Plainly the decision of the court below completely destroys the substance of the right to counsel.

The question presented is whether a judgment of conviction entered in a trial conducted in violation of the requirements of due process of law is such that it "is void and may be questioned collaterally." It is respectfully submitted that the precise question has been answered in the affirmative by the Supreme Court.

In *Moore v. Dempsey,* 261 U. S. 86, the prisoners had been sentenced after a trial dominated by a mob. The trial court had jurisdiction of the offense and the accused, but the Supreme Court held that the mob domination of the trial deprived the prisoners of their liberty without due process of law and reversed the order of the lower court dismissing a petition for habeas corpus.

Moore v. Dempsey was followed by the Circuit Court of

Appeals for the Fifth Circuit in *Downer v. Dunaway,* 53 F. (2d) 586, in which it was argued that, although the trial had been dominated by a mob, the remedy of the petitioners was by a motion for a new trial or appeal from the conviction, and not by habeas corpus. The Circuit Court of Appeals overruled this argument upon the ground that the failure of counsel appointed by the Court for the prisoners to move for a new trial because of fear of mob violence *was a failure of the corrective process of the Court.*

The analogy between deprivation of liberty without due process of law through mob domination, and similar deprivation through the denial of the right to counsel, was recognized by the Supreme Court in *Powell v. Alabama, supra,* in which it was said that:

> "* * * a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob" (287 U. S., at p. 59).

The Circuit Court of Appeals in its opinion predicates the right to protest against the denial of due process on the existence of circumstances surrounding the trial which make it "a sham and a pretense," and the Court appears to consider that such circumstances exist only when there is a spirit of mob domination. In placing such narrow construction upon the rights of petitioner, it is submitted that the Circuit Court of Appeals has ignored the principle announced by this Court in the cases of *Mooney v. Holohan,* 294 U. S. 103, and *Brown v. Mississippi,* 297 U. S. 278. In neither of those cases were there present any of the circumstances of mob domination, but the Court

nevertheless held that, upon the showing of the facts there asserted, the trial in each instance was a "mere pretense." In fact, the Court there grouped the several different types of circumstances together and classified them all as a deprivation of constitutional right which made the trial a nullity. As was said by the Court:

> "* * * The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U. S. 86, 91. The state may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U. S. 45. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which, in truth, is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' *Mooney v. Holohan*, 294 U. S. 103, 112. And *the trial equally is a mere pretense* where the state authorities have contrived a conviction resting solely upon confessions obtained by violence" (297 U. S., at p. 286). (Italics supplied.)

CONCLUSION.

The question involved in this case is an important question of Federal law in which the opinion of the Circuit Court of Appeals is probably in conflict with decisions of this Court and which should be decided by this Court. It is, therefore, respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ELBERT P. TUTTLE,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.